

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of)	
)	
Core Communications, Inc.)	WC Docket No. 03-171
)	
Petition for Forbearance under 47 U.S.C. §)	
160(c) from Application of the ISP Remand Order)	

**CORE COMMUNICATION INC.'S REQUEST FOR A DETERMINATION
IN PENDING RECONSIDERATION PROCEEDING AS TO WHETHER
CORE'S FORBEARANCE PETITION WAS CONCLUSIVELY "DEEMED
GRANTED" BY OPERATION OF 47 U.S.C. § 160(c)**

I. INTRODUCTION

In 47 U.S.C. § 160(c), Congress provided that a forbearance petition that is not denied within 12 months on the basis of section 160(a) factors is "deemed granted," and Congress authorized the Commission to extend that period for no more than 90 days, to a total of 15 months. Core Communications, Inc. ("Core") filed a forbearance petition, and the 15-month deadline in section 160(c) passed without any formal agency action. After the 15-month deadline passed, the Commission issued an order purporting to deny forbearance in part. The Commission backdated its order to pre-date the expiration of the statutory deadline. A reconsideration proceeding was commenced by Qwest Corporation ("Qwest"). The reconsideration pleadings raised the issue whether Core's forbearance petition was conclusively "deemed granted" by Congress under section 160(c), and the validity of the Commission's forbearance order turned on that issue. Core sought judicial review of the section 160(c) issue, but the D.C. Circuit held that the issue was not yet ripe for judicial review because "the Commission has not yet ruled on Qwest's petition for reconsideration, which remains pending before it." *In re Core Commc'ns, Inc.*, D.C. Cir. 04-1368, Per Curiam Order (Oct. 13, 2006).

Accordingly, Core respectfully requests that the Commission resolve the pending section 160(c) issue. The issue is this: Was Core's forbearance petition conclusively "deemed granted" as a matter of law, by operation of section 160(c), because the statutory deadline expired on October 11, 2004 without the Commission having issued a written order denying forbearance on the basis of section 160(a) factors? This is a recurring issue, because in other forbearance proceedings the Commission had done what it did below: issued a post-deadline order backdated to a pre-deadline vote. The Commission should, once and for all, explain whether (and how) this practice is consistent with section 160(c).

II. BACKGROUND

A. CORE'S FORBEARANCE PETITION

This case concerns a petition for forbearance filed by Core pursuant to 47 U.S.C. § 160(c). *Petition of Core Communications, Inc. for Forbearance Under 47 U.S.C. § 160(c) from Application of the ISP Remand Order*, WC Docket No. 03-171 (filed July 14, 2003) ("Core's Forbearance Petition"). Core's petition requested forbearance from enforcement of interim inter-carrier compensation rules which the Commission had adopted to govern ISP traffic—the so-called *ISP Remand Order*.¹

In section 160(c) Congress prescribed a statutory deadline for agency action. Congress provided that a forbearance petition "shall be deemed granted" unless the Commission denies the petition within 15 months on the basis of section 160(a) factors with an analysis "explain[ed]" in "writing." 47 U.S.C. § 160(c). In this case, the statutory deadline for acting on Core's

¹ Order on Remand and Report and Order, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Intercarrier Compensation for ISP-Bound Traffic*, 16 FCC Rcd 9151 (2001) ("*ISP Remand Order*"), remanded, *WorldCom, Inc. v. FCC*, 288 F.3d 429 (D.C. Cir. 2002).

Forbearance Petition was October 11, 2004. That deadline passed without any binding or formal agency action taken by the Commission on Core's Forbearance Petition. (The Commission had a private vote on the petition and issued a press release before the deadline, but the private vote is neither binding (it is subject to change) nor formal agency action subject to judicial review, and a press release is not public notice. 47 CFR 1.4(b)(2).)

B. THE COMMISSION'S ORDER ON CORE'S FORBEARANCE PETITION

After the October 11, 2004 deadline passed, the Commission issued an order purporting to deny Core's Forbearance Petition in part. 19 FCC Rcd 20179 (Oct. 18, 2004) ("Forbearance Order").

The Commission backdated its Forbearance Order to correspond to the date when Commission members privately cast their votes. That act purported to make the Forbearance Order fall within the statutory deadline set by Congress in section 160(c).

C. CORE'S D.C. CIRCUIT ACTION

About a week after the Forbearance Order, Core filed on October 27, 2004 a declaratory judgment complaint in the D.C. Circuit, along with a motion for summary judgment, which contended that Core's Forbearance Petition was conclusively "deemed granted" on October 11, 2004, because the Commission did not deny Core's Forbearance Petition by formal agency action before the statutory deadline. Core's position was and is that the steps taken by the Commission before the statutory deadline (a private vote and press release) did not constitute the type of agency action required by Congress under section 160(c) to satisfy the statutory deadline. Core ultimately filed a petition for judicial review in the D.C. Circuit raising the same issue Core had raised in its declaratory judgment action.

D. THE PENDING RECONSIDERATION PROCEEDING

After the Commission issued its Forbearance Order, Qwest Corporation (“Qwest”) timely filed a petition for reconsideration on November 10, 2004, and Core filed a response to Qwest’s reconsideration petition on November 18, 2004.² These reconsideration pleadings presented to the Commission the issue whether Core’s Forbearance Petition should conclusively be “deemed granted” by operation of section 160(c) based on the fact that the Commission did not issue its order denying Core’s Forbearance Petition within the statutory deadline.

That the section 160(c) issue was presented in the reconsideration proceeding cannot reasonably be doubted, and indeed the Commission has already determined it was. In the above-referenced D.C. Circuit action, the Commission filed in the D.C. Circuit on January 28, 2004 a Motion To Hold Case In Abeyance (hereinafter, “FCC’s Abeyance Motion”). The FCC’s Abeyance Motion asked the D.C. Circuit “to hold these consolidated cases in abeyance pending the completion of agency reconsideration proceedings” because the “*pending petitions for reconsideration present to the FCC essentially the same arguments* that the petitioners will present to the Court.” FCC’s Abeyance Motion, p. 1 (emphasis added). The FCC’s Abeyance Motion could not have been clearer in explaining that Core’s section 160(c) issue was adequately presented in the pending reconsideration proceeding:

Qwest’s petition for administrative reconsideration *presents to the Commission the identical* [section 160(c)] “deemed granted” question. The issue is before the Commission for the first time, as the question did not arise until the *Forbearance Order* issued. Qwest argues on reconsideration that . . . “the passage of time without action by the FCC on a forbearance petition [in any event] does not divest” the Commission of jurisdiction, it merely operates to effectuate a grant of the petition subject to the normal

² Conditional Petition for Reconsideration of Qwest Corporation (filed Nov. 10, 2004); Opposition of Core Communications, Inc. to Qwest Corporation’s Petition for Reconsideration, WC Docket No. 03-171, at 3 (filed Nov. 18, 2004).

rules regarding reconsideration and judicial review.” [Citing Qwest’s reconsideration petition] *Qwest thus asks the Commission to consider, as a threshold matter, whether the Commission’s adoption of an order addressing Core’s petition within the 15-month deadline was sufficient to satisfy the statute’s requirements for timely Commission action, even though the order was not released within the 15-month deadline.*

Holding the [D.C. Circuit proceeding] in abeyance is warranted in these circumstances, *because Qwest’s reconsideration request gives the Commission its first opportunity to address the “deemed granted” claim that Core is now presenting in Court. . . . The agency’s formal response to Qwest’s reconsideration request, moreover, almost certainly will address the “deemed granted” issue, and could modify it or moot it.*

FCC’s Abeyance Motion, pp. 4-5 (emphasis added). Likewise, in its reply brief in support of its Abeyance Motion, the Commission reiterated to the D.C. Circuit that the reconsideration proceeding gives it “an opportunity to address the scope of its jurisdiction in light of the ‘deemed granted’ clause” and that “the Commission is able to perform any interpretive gap-filling that may be necessary on reconsideration.” Reply of FCC to Oppositions to Motion to Hold Case in Abeyance, pp. 3-4, Nos 04-1423 & 04-1424, D.C. Cir. (filed Feb. 25, 2005).

The Commission also informed the D.C. Circuit that *Core itself had joined the section 160(c) issue in the reconsideration proceeding* by filing a pleading in that proceeding, a pleading which contended that section 160(c) divested the Commission of authority to do anything on Core’s forbearance petition after the statutory deadline had expired:

To avoid the possibility that Core’s forbearance petition may have been granted in its entirety, therefore, Qwest asked the Commission on reconsideration to reaffirm the *Forbearance Order* insofar as it had denied Core’s forbearance petition in part. *Core then directly joined issue with Qwest, contending before the Commission that its (Core’s) forbearance petition was “deemed granted by operation of law” and that “the Commission may not reach back in time on reconsideration to take away what was granted by Congress by operation of law.” [T]herefore, the jurisdictional issue that Core is presenting on judicial review plainly is before the FCC in the pending reconsideration proceeding.*

Id. at 5-6 (quoting Core’s opposition to Qwest’s petition) (emphasis added) (citation omitted).

Finally, in its D.C. Circuit brief on the merits, the Commission reiterated that the section 160(c) “issue currently is before the Commission in proceedings on reconsideration of the [Forbearance Order].” Brief of FCC, D.C. Circuit, No. 04-1423, pp. 31, 34 & n.20.

E. THE D.C. CIRCUIT DID NOT REVIEW THE SECTION 160(c) ISSUE BECAUSE THE COMMISSION HAS NOT YET RULED ON THAT ISSUE IN THE PENDING RECONSIDERATION PROCEEDING

The D.C. Circuit concluded, “Of course, Core . . . had good reason not to address, in its forbearance petition, whether a timely denial of that petition would require a written decision or only the announcement of the Commission’s vote: Core could not have known, when it filed the petition, that the FCC would wait to issue its written denial until after the October 11 deadline had passed.” *In re Core Commc’ns, Inc.*, 455 F.3d 267, 276 (D.C. Cir. 2006). But the Court ultimately held, on the basis of section 47 U.S.C. § 405(a), that it could not review the section 160(c) issue, because Core had not exhausted its administrative remedies. The Court “cannot be the first authority to construe the meaning of § 160(c),” the D.C. Circuit concluded. *Id.* at 277. In a per curiam order on Core’s petition for rehearing, the D.C. Circuit clarified its rationale, holding that it could not exercise judicial review, because **“the Commission has not yet ruled on Qwest’s petition for reconsideration, which remains pending before it.”** *In re Core Commc’ns, Inc.*, D.C. Cir. 04-1368, 2006 WL 3069547 (per curiam Oct. 13, 2006) (emphasis added) (attached hereto as Tab A). The Court explained that because Core failed “to await the Commission’s disposition of” the reconsideration proceeding before seeking judicial review and opposed the Commission’s Abeyance Motion, the Commission was not yet afforded an opportunity pass on the section 160(c) issue, and without the Commission’s interpretation of section 160(c), the D.C. Circuit could not review it. *Id.*

For support, the D.C. Circuit cited *Petroleum Comm'n's, Inc. v. FCC*, 22 F.3d 1164, 1170-1171 (D.C. Cir. 1994). In *Petroleum* a party petitioned for judicial review of an order while another party's petition for reconsideration was pending, and the D.C. Circuit held that it could not review the issue presented to it because the reconsideration proceeding was not yet completed. *Id.* ("The FCC has yet to dispose of this petition, but claims that a draft order is currently undergoing internal review. Had the Commission already completed its review of this petition for partial reconsideration, we would find the exhaustion requirement vicariously satisfied as to petitioners.") (footnote omitted). The *Petroleum* court dropped a footnote stating:

We must assume that this [FCC reconsideration] order will be promptly forthcoming. Petitioners' counsel at oral argument revealed that one factor motivating his decision to seek immediate judicial review rather than agency reconsideration was the massive delay involved with the latter alternative. The agency has already spent almost a year and a half on this petition. We sympathize with counsel's point, urge the Commission to put an end to this impasse, and point out the availability of relief if our assumption of a prompt decision proves wrong. *See, e.g., Telecommunications Research & Action Center v. FCC*, 750 F.2d 70, 76-77 (D.C.Cir.1984) (examining this court's "important role" in compelling agency action that has been improperly withheld or unreasonably delayed).

Id. at 1170. The D.C. Circuit analogized Core's petition for judicial review to the one in *Petroleum* and concluded that judicial review could not be had because **"the FCC has not yet disposed of"** the pending reconsideration proceeding. *In re Core Commc'ns, Inc.*, D.C. Cir. 04-1368, 2006 WL 3069547 (per curiam Oct. 13, 2006) (emphasis added) (attached hereto).³

³ The D.C. Circuit added, "None of the foregoing should be understood to place this court's imprimatur on the FCC's actions. Waiting until the eleventh hour to vote on a forbearance petition, and then waiting until the thirteenth hour to issue the explanatory order, is hardly an ideal procedure for notifying a party of the disposition of a petition. And relying on an informal press release and a back-dating regulation to satisfy a statutory deadline could unnecessarily place Commission policies at risk of judicial invalidation." 455 F.3d at 277.

In short, the D.C. Circuit held that the section 160(c) issue is not ripe for judicial review until the Commission addresses the issue in the pending reconsideration proceeding. That is the basis for this request. Core urges the Commission to determine whether Core's Forbearance Petition was conclusively "deemed granted" by operation of section 160(c).

III. REQUEST FOR A RULING ON THE SECTION 160(c) ISSUE

Section 160(c) prescribes the factors the FCC must consider in reviewing a forbearance petition—they are listed in subsection (a) of section 160—and Congress required that the Commission "shall explain its decision in writing." 47 U.S.C. § 160(c). Desiring to "force" the Commission to act on forbearance petitions "in a timely manner," 141 Cong. Rec. S7881-02, S7898 (June 7, 1995) (statement of Sen. Dole), Congress prescribed a concrete deadline for agency action and a self-executing remedy for the agency's failure to deny a petition by formal agency action before the deadline expires:

Any such petition shall be deemed granted if the Commission does not deny the petition for failure to meet the requirements for forbearance under subsection (a) of this section within one year after receives it, unless the one-year period is extend by the Commission. The Commission may extend the initial one-year period by an additional 90 days if the Commission finds that an extension is necessary to meet the requirements of subsection (a) of this section. The Commission . . . shall explain its decision in writing.

47 U.S.C. § 160(c) (emphasis added). Congress could not have been clearer in declaring that if the Commission fails to deny a forbearance petition based on the subsection (a) factors before the 15-month deadline expires, the "petition shall be deemed granted" by operation of law. *See Tri-State v. Bancorporation, Inc. v. Bd. of Governors of Federal Reserve Sys.*, 524 F.2d 562, 568 (7th Cir. 1975) (agency divested of jurisdiction where statute granting it jurisdiction over applications for approval provided that such applications "shall be deemed to have been granted" in the event

the agency failed to act within the statutory deadline and the agency failed to act).

There is no basis for concluding that Congress, contrary to established administrative law, intended a nonbinding, informal agency action to satisfy section 160(c)'s deadline (*e.g.*, a mere vote, which is subject to change). The only reasonable interpretation of section 160(c) is that a forbearance petition is not "denied" by the Commission unless the denial is done in a binding and legally effective manner, with public notice, before the statutory deadline expires. After all, Congress mandated that, in order to avoid a "deemed granted" resolution, the Commission must not simply deny forbearance before expiration of the statutory deadline, but must deny forbearance *on the basis of section 160(a) factors*; and, absent a written order, there is no basis to determine whether and how the Commission has evaluated those factors before the statutory deadline. Moreover, Congress denied the Commission authority to extend that one-year deadline by more than 90 days, 47 U.S.C. § 160(c), and that limitation would be rendered largely meaningless if the Commission had unfettered authority to backdate its orders.

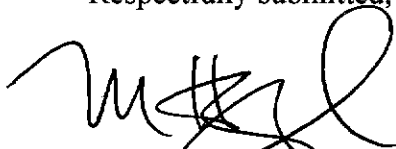
In sum, a forbearance petition is conclusively "deemed granted" by operation of law when the Commission lets the statutory deadline expire before denying forbearance in writing on the basis of section 160(a) factors. As a consequence, when the deadline expires, the Commission is divested of authority to act on the petition, much less to *deny* it, because the Commission has no authority to reverse Congress's self-executing "deemed granted" *grant* of forbearance.

But if the Commission disagrees with the foregoing interpretation of section 160(c), it should explain why. This is an important and recurring issue concerning the Commission's authority. This issue necessarily subsumes two subsidiary questions: whether a mere vote before the deadline is sufficient to satisfy section 160(c); and, if not, whether the Commission may, after a forbearance petition is "deemed granted" by operation of section 160(c), deny the petition.

IV. CONCLUSION

Core respectfully requests that the Commission decide whether Core's Forbearance Petition was conclusively "deemed granted" by operation of law on October 11, 2004, when the statutory deadline in section 160(c) expired without the Commission having denied Core's Forbearance Petition in a written order on the basis of section 160(a) factors.

Respectfully submitted,



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January 9, 2007

WCSR 3497614v1

TAB A

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 04-1368

September Term, 2006

Statement of the Panel

PER CURIAM:

Our opinion in this case held that, because the Federal Communication Commission (FCC) never had an “opportunity to pass” on Core Communications, Inc.’s argument that its forbearance request was deemed granted by operation of law, this court is barred by 47 U.S.C. § 405(a) from reaching the merits of that argument. *In re Core Commc’ns, Inc.*, 455 F.3d 267, 275-77 (D.C. Cir. 2006). Core’s petition for rehearing contends that, although Core did not raise the “deemed granted” argument before the Commission issued the order Core challenges, and did not thereafter seek Commission reconsideration, the Commission nonetheless had an opportunity to pass because Qwest Corp.—another party to the FCC proceedings and an intervenor in this court—did seek reconsideration. According to Core, Qwest raised the “deemed granted” issue in its petition for reconsideration to the FCC, and Core filed a responsive pleading in that proceeding. This is the first time Core has contended that Qwest’s petition satisfies § 405, notwithstanding that we extensively questioned Core about the § 405 issue at oral argument.

Core’s argument is unavailing. The company is correct, of course, that § 405(a) does not require that the party seeking judicial review be the same party that presented the issue to the FCC. *See, e.g., Teledesic LLC v. FCC*, 275 F.3d 75, 82-83 (D.C. Cir. 2001); *Time Warner Entm’t Co. v. FCC*, 144 F.3d 75, 79-80 (D.C. Cir. 1998). But even assuming that the “deemed granted” issue was presented in the Qwest reconsideration proceeding -- a contention that Qwest itself disputes -- the Commission has not yet ruled on Qwest’s petition for reconsideration, which remains pending before it. Indeed, Core opposed the FCC’s motion to hold this case in abeyance pending the Commission’s decision on Qwest’s petition, a position to which a motions panel of this court acceded. In short, Core failed either to seek reconsideration itself or to await the Commission’s disposition of a petition filed by another party. As a consequence, the Commission was not afforded an opportunity to pass on the “deemed granted” issue.

This case is indistinguishable from *Petroleum Communications, Inc. v. FCC*, 22 F.3d 1164 (D.C. Cir. 1994). There, we held that § 405(a) barred our review of the petitioners’ contention that the FCC had promulgated a cellular licensing regulation without first providing proper notice and an opportunity for comment under the Administrative Procedure Act, 5 U.S.C. § 553. Like Core, the *Petroleum Communications* petitioners contended that, although they had not themselves raised the issue before the Commission,

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

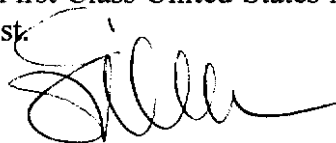
No. 04-1368

September Term, 2006

another participant in the administrative proceeding had filed a petition for reconsideration that raised the same issue. As in this case, the FCC had not yet disposed of the other participant's petition. "[W]ithout the agency's resolution of the issue," we concluded, "we simply cannot say that the Commission 'has erred against objection made at the time appropriate under its practice.'" *Id.* at 1170 (quoting *United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37 (1952)). Accordingly, we held that another participant's pending petition for reconsideration "cannot rescue [the petitioners] from the strictures of § 405(a)." *Id.* at 1170-71. Core's argument fails for the same reason.

CERTIFICATE OF SERVICE

I, Edilma M. Carr, do hereby certify that I have caused the foregoing "Core Communication Inc.'s Request for A Determination in Pending Reconsideration Proceeding as to Whether Core's Forbearance Petition was Conclusively "Deemed Granted" by Operation of 47 U.S.C. § 160(c)" to be: 1) filed with the FCC, via its Electronic Comment Filing System in WC Docket No. 03-171; 2) served, via email on the FCC's duplicating contractor, Best Copy and Printing, Inc. at fcc@bcpiweb.com; and 3) served via First Class United States Mail, postage prepaid, on the parties listed on the following service list.



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January 9, 2007

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